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No. 816

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

BLANCHE PEEKE, Administratrix of the Estate of GEORGE DEWEY JENSIK, Deceased,
Petitioner,
vs.
ELLEN M. ENOCH and DAVID W. ENOCH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS OR THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

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INDEX

	PAGE
Opinion Below	2, 1a
Jurisdiction	2
Questions Presented	3
Statement	4
Argument	17
Point I— The Illinois Courts Had No Jurisdiction To Enter And Affirm And Refuse To Review Further The Summary Judgment In This Case Because There Was No Admission, Consent, Or Default, On Which It Could Be Predicated	17
Point II— The Illinois Courts Had No Jurisdiction To Enter And Affirm And Refuse To Review Further The Summary Judgment In This Case Because There Was No Evidence On Which It Could Be Predicated	22
Point III— Insolvency Of The Corporation Is Shown By Claimants' Own Pleading And Proof And Is A Complete Defense, Not Required To Be Raised In The Probate Court Since It Appears On The Face Of The Record And Defeats The Claim, Because The Lease Was Either Still Born Or Terminated Before Or On March 1, 1958, By Its Own Terms, By Reason Of The Insolvency Of The Corporation And The Provisions Of Section IX Of The Lease, Discharging The Corporation From Any Further Liability Under The Lease and Discharging The Deceased From Any Possible Statutory Liability Predicated Upon It	26

PAGE

Point IV—

Petitioner And Those She Represents Have By State Action Been Deprived Of Their Property Without Due Process Of Law, And Have Been Denied The Equal Protection Of The Laws Of Illinois, In Violation Of The Federal Rights Under The 14th Amendment, Section 1 Of The Constitution Of The United States 37

Reasons Why This Petition Should Be Granted 42

Conclusion 43

Appendix "A"—Opinion of the Appellate Court 1a

Appendix "B"—Kansas Constitution and Statutes

Kansas Constitution § 2 p. LXXI 12a
Kansas Statutes Annotated 12a
The General Corporations Code 12a
17-2703 ..... 12a
17-2802 ..... 12a
17-2804 ..... 12a
17-2805 ..... 13a
17-2806(A) 13a
17-2806(B) 14a
17-2807 ..... 14a
17-3001 ..... 14a
17-3101 ..... 14a
17-3101 ..... 15a
17-3105 ..... 15a
17-4007 ..... 16a
17-4008 ..... 16a
17-4009 ..... 16a
17-4505 ..... 16a

CAUSES OF ACTION WHICH SURVIVE.

60-3201 ..... 16a

Appendix "C"—Illinois Statutes and Rules

Civil Practice Act

§ 1 ..... 17a
§ 43 ..... 17a
§ 57(1)-(4) 17a

PAGE

Supreme Court Rules 18a
Rule 15 ..... 18a
Probate Act 19a
§ 3a 19a
§ 4a 19a
§ 192 ..... 19a
§ 199 ..... 19a

CASES.

Bergesen v. Clauss, 15 Ill. 2d 337, 155 N.E. 2d 20, 68 ALR 2d 446 25
Blond v. United States Fidelity & G. Co., 1935, 336 Mo. 684, 8 S.W. 2d 675, 99 ALR 36, 41 30
Cunningham v. City of Sullivan, 1958, 15 Ill. App. 2d 561 31
Enoch v. Peeke, 1962, 34 Ill. App. 2d 130, 180 N.E. 2d 740 ..... 2, 1a
In Re Outfitters' Operating Realty Co., 69 F. 2d 90, 91 .. 27
In Re Walker, 2 Cir. 1937, 93 F. 2d 281, 283 27
In Re Willow Cafeteria, 2 Cir. 1938, 95 F. 2d 306, 308; 115 ALR 1184, 1187 27
In Re Young's Estate, 1953, 414 Ill. 525 18
Judd v. Mutual Bank & Trust Co., 1932, 114 Conn. 553, 560 30
Kohler v. Jacobs (1943, C.A. 5 Ga.), 138 F. 2d 440 24
Lawson v. Callaway, 1930, 131 Kan. 789, 293 P. 503 25
Murray Realty Co. v. Regal Shoe Company, 1934, 265 N.Y. 332, 335 29
Pink v. Dempsey, 350 Ill. App. 405, 113 N.E. 2d 334 23
Sullivan v. Corn Products Co., 1910, 245 Ill. 9, 91 N.E. 2d 643 23

CONSTITUTIONAL PROVISIONS.

Constitution of the United States
Article 1 Section 10 ..... 37, 38, 39, 41
14th Amendment Section 1 ..... 36, 38, 39, 41

PAGE

STATUTORY PROVISIONS.

Illinois Civil Practice Act
- Section 1 ..... 18, 19
- Section 35 20
- Section 36 33
- Section 40 20
- Section 43(3) 21
- Section 45(5) 21
- Section 57(a)-(e) 21, 24, 34

Illinois Probate Act
- Section 3a 19
- Section 4 18
- Section 5 18
- Section 192 19
- Section 199 19

28 U.S.C.A. 1257(3); 28 U.S.C. 1257(3) 3

RULES OF COURT.

Rule 56, Federal Rules of Civil Procedure 24
Rule 54, Probate Court of Cook County 22
Rule 15, Supreme Court of Illinois 22, 24
Rule 18(2), Supreme Court of Illinois 34

MISCELLANEOUS.

91 Am. Jur. 526 32
91 A.L.R. 884 32
15 A.L.R. 1189 27
168 A.L.R. 504 27
49 C.J. 291 31
49 C.J. 299 17
4 C.J.S. 727 32
71 C.J.S. 337 31

TEXTBOOKS.

Edward W. Cleary, Handbook of Illinois Evidence, pp. 22, 23, 27 23
William M. Fletcher, Cyclopedia of the Law of Private Corporations, 1947 Replacement Volume, Vol. 3 35
1961 Revised Volume 13 36

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS OR THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Blanche Peeke, Administratrix of the Estate of John Dewey Jensik, Deceased, prays that the Court will issue a writ of certiorari to the Supreme Court of Illinois or to the Illinois Appellate Court, First District, to review the judgments of those courts in the case entitled "*Ellen M. Enoch and David W. Enoch, Claimants-Appellees, v. Blanche Peeke, Administratrix of the Estate of George Dewey Jensik, Deceased, Defendant-Appellant*" filed in the Illinois Appellate Court, First

District, as Case No. 48481, and entitled *"Ellen M. Enoch and David W. Enoch, Claimants—Appellees In The Appellate Court—Appellees,* v. *Blanche Peeke, Administratrix of the Estate of George Dewey Jensik, Deceased, Defendant—Appellant In The Appellate Court—Appellant" filed* in the Supreme Court of Illinois, as Case No. 47235.

OPINIONS BELOW

The Illinois Appellate Court, First District, wrote an opinion. It is published as *Enoch* v. *Peeke,* (1962) 34 Ill. App. 2d 130, 180 NE2d 740. A copy of the opinion is printed in Appendix "A". Neither the Supreme Court of Illinois nor the Probate Court of Cook County wrote an opinion.

JURISDICTION

The judgment of the Illinois Appellate Court, First District, was entered on February 23, 1962, and became final for purposes of review by the Supreme Court of Illinois on denial of a timely Petition For Rehearing on March 20, 1962. On April 13, 1962, the Illinois Appellate Court, First District, denied a motion filed April 13, 1962, to vacate its judgment, predicated on the ground it exceeded the jurisdiction of the court and was a void judgment. On April 16, 1962, Petitioner filed a Notice of Appeal as a matter of constitutional right under the Constitution of the State of Illinois to the Supreme Court of Illinois. On April 30, 1962, Petitioner filed a Petition For Leave to Appeal from the Appellate Court of Illinois, First District, in the Supreme Court of Illinois, entitled *"Ellen M. Enoch and David W. Enoch, Claimants—Appellees In The Appellate Court—Respondents,* v. *Blanche Peeke, Administratrix of the Estate of George Dewey Jensik, Deceased, Defendant—Appellant In The Appellate Court—Petitioner",* as Case No. 37244.

On July 12, 1962, the Supreme Court of Illinois dismissed the appeal as a matter of constitutional right. On September 26, 1962, the Supreme Court of Illinois denied leave to appeal. This terminated any further proceedings in the State Courts.

Petitioner's Petition For A Writ Of Certiorari To The Supreme Court of Illinois or To The Illinois Appellate Court, First District, dating from September 26, 1962, was due to be filed on or before December 25, 1962.

On December 21, 1963, time for filing a Petition For Writ Of Certiorari was extended to and including February 1, 1963, by Mr. Justice Clark. On January 31, 1963, the time for filing a petition was extended to and including February 11, 1963, by Mr. Justice Clark.

Jurisdiction of this Court is based on 28 U.S.C.A. 1257 (3), 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED.

1.

Whether, in the absence of any statute or rule or order requiring an administratrix to file an answer to a claim, and in the presence of an answer objecting to allowance of the claim limited to defenses going to the jurisdiction of the subject matter and in abatement, which did not, by statute, constitute an admission of the facts alleged in the claim, the Illinois courts had jurisdiction to enter a summary judgment against her on the claim on the ground she had admitted all allegations of material fact in the claim by her failure to deny them in the answer.

2.

Whether, in the absence of any other testimony, when it affirmatively appears on the face of the record that the

sworn answers of the claimants to interrogatories, propounded to them by an administratrix for discovery purposes only, relied on by them to prove their claim over the administratrix's protest, are such that, if they were sworn as witnesses, they could not testify competently thereto, the statutes providing that no party or person directly interested in the event thereof, shall be allowed to testify of his own motion, or in his own behalf, when any adverse party sues or defends as representative of a deceased or incompetent person, the Illinois courts had jurisdiction to enter a summary judgment against her on the ground they had proved all allegations of material fact in the claim by their testimony.

3.

Whether a summary judgment against an administratrix of the estate of a deceased officer and director of an insolvent corporation, or an apparently insolvent estate, insolvent when the lease was entered into, or insolvent within thirty days thereafter, predicated on a lease providing that it shall terminate forthwith upon the insolvency of the corporation, under a statute providing that if a corporation has transacted any business before it is authorized to transact any business he shall be liable for the debts or liabilities of the corporation arising therefrom, has impaired the obligation of the lease that it shall terminate forthwith.

4.

Whether, regardless of the answer to be given to each of the preceding questions by this Court, the Illinois courts have, in entering and affirming a summary judgment against petitioner under the circumstances specified therein, and in dismissing a further appeal taken as a matter of right, deprived her and those she represents of

their property without due process of state law, and have denied to them their day in court and the equal protection of state law, in violation of their Federal rights under the 14th Amendment, Section 1, to the Constitution of the United States.

STATEMENT

The statements of purported fact upon which the summary judgment was entered and affirmed are set forth in the opinion but the purported facts relied upon to defeat it and the claim are not. For example, the summary judgment is based on a written lease, a copy of which is attached to the statement of claim, which provides that upon insolvency of the corporation it shall terminate forthwith, and on answers to written interrogatories propounded to respondents by the petitioner for purposes of discovery only, which, coupled with the allegations of facts in the statement of claim and lease, establish that the corporation was insolvent when the lease was signed or became insolvent thirty days thereafter. Furthermore, the claimants made a written request of petitioner to admit the genuineness of certain documents and the truth of a statement that on or before the death of the decedent none of the capital with which the corporation was to begin business was paid in, which documents, if genuine and which fact, if true, confirm the fact the corporation was insolvent when the lease was signed or became insolvent thirty days thereafter. The provisions of the lease, the answers to the interrogatories, the documents, and the purported fact none of the capital had been paid in, which defeat the claim, are not set out in the opinion.

This litigation began on August 11, 1959, with the filing of a verified claim against the Estate of George Dewey Jensik, Deceased, by Ellen M. Enoch and David W. Enoch,

in the Probate Court of Cook County, for $57,000.00, to enforce a statutory liability created by the State of Kansas against an officer or non-dissenting director of a Kansas corporation for a debt or liability of the corporation incurred by the corporation in purportedly transacting business, *i.e.* executing a lease, in violation of the statute (A. 2-11). The claim was set forth in a Statement of Claim attached to the claim blank supplied by the Probate Court (A. 2). A copy of the purported lease was attached to the Statement of Claim. The corporation had allegedly defaulted in paying rent under the lease (A. 2-5). On September 14, 1959, petitioner filed a motion to strike and dismiss the Statement of Claim (A. 11). On the same date she filed a jury demand. [This fact is of record in the Probate Court but does not appear in the record on appeal]. On December 12, 1959, the motion to strike the claim for rentals accruing between October 1, 1959, to January 1, 1963, was granted (A. 15). On December 22, 1959, the motion to strike the claim for rentals accruing between March 1, 1959, through September 1, 1959, was denied (A. 15). On January 14, 1960, petitioner filed an Answer devoted exclusively to defenses to jurisdiction of the subject matter and in abatement (A. 16). It stated why the Statement of Claim did not state a cause of action. On March 10, 1960, she amended her Answer to assert in abatement that a statement in the Statement of Claim that respondents had attempted to lease the premises to mitigate damages was a mere conclusion of the pleaders (A. 19). On March 11, 1960, she filed a petition to implead other persons as third party defendants (A. 23). On April 6, 1960, the petition was denied for want of jurisdiction (A. 26). On April 2, 1960, petitioner filed a petition for the special finding required by Section 50(2) (A. 26). On May 11, 1960, the petition was denied (A. 30). On June 3, 1960, re-

spondents made a request of petitioner for admission of genuineness of documents and of the truth of facts (A. 33). On June 14, 1960, petitioner answered the request by asserting lack of knowledge (A. 43). On June 15, 1960, petitioner propounded interrogatories to each respondent (A. 46). On October 5, 1960, each respondent filed an answer under oath (A. 51) (A. 57). On January 16, 1961, they filed a motion for summary judgment without supporting affidavit (A. 64). On January 16, 1961, petitioner filed a motion that the motion for summary judgment should be denied (A. 66). A supporting affidavit by petitioner was attached (A. 68). On January 17, 1961, the respondents filed a motion to strike the affidavit (A. 74). It was stricken (A. 75). The motion for summary judgment in the sum of $17,500.00 was allowed on the same day (A. 75). Notice of Appeal was filed March 10, 1961 (A. 76). The record was filed in the Appellate Court on May 1, 1961. On February 23, 1962, the summary judgment was affirmed. A petition For Rehearing filed March 19, 1962, was denied March 20, 1962. It raised a question involving a construction of the Constitution of the State of Illinois and a construction of the Constitution of the United States. On April 13, 1962, petitioner filed a motion to vacate the judgment of February 23, 1962, and it was denied on April 13, 1962. It claimed the Probate Court and the Appellate Court had exceeded their jurisdiction and raised a question involving a construction of the Constitution of the State of Illinois and a construction of the Constitution of the United States. On April 16, 1962, the defendant filed a Notice of Appeal as a matter of constitutional right from the judgment of February 23, 1962, and from the order of April 13, 1962. The record on the appeal as a matter of right was filed in the Supreme Court of Illinois on April 20, 1962, under docket number 37235. The Petition For

Leave To Appeal was filed on April 30, 1962 as Case No. 37244. Respondents filed a motion to dismiss the appeal as a matter of right and their motion was granted on July 12, 1962. The petition for leave to appeal was denied October 2, 1962. Time for filing a petition for writ of certiorari was extended to and including February 1, 1963, on December 21, 1962, by Mr. Justice Clark, and then extended by him to and including February 11, 1963, on February 1, 1963.

The complaint is verified by the joint affidavit of Ellen M. Enoch and David W. Enoch, the respondents. It alleges that the decedent, George D. Jensik, was one of the incorporators of Alcore Homes Incorporated, a Kansas corporation, and a Director and Secretary-Treasurer of said corporation. The Articles of Incorporation of Alcore Homes Incorporated were filed in the Office of the Secretary of State of Kansas on November 4, 1957. The resident agent of said corporation was stated in said Articles of Incorporation to be Prentice-Hall Corporation System, and the registered office to be the Columbian Building, Topeka, Kansas, in care of Roy McCue.

On January 27, 1958, a lease was executed by Alcore Homes Incorporated, as Lessee, Glen P. Martin, President, and George D. Jensik, Secretary, signing on behalf of said corporation, and Ellen M. Enoch and Davis W. Enoch, as Lessors, to certain real estate located in Wichita, Sedgwick County, Kansas, whereby said Lessee agreed to pay the sum of $57,000 for the rental of said premises for the period from February 1, 1958, through January 1, 1963, payable $950.00 per month in advance, the first payment being due February 1, 1958, but has paid no further sums due under said lease. A copy of the lease was attached to the complaint and made a part thereof by reference. Respondents subsequently at-

tempted to lease said premises to others in order to mitigate their damages but have been unable to do so.

No affidavit has been filed by the Treasurer of Alcore Homes Incorporated with the Register of Deeds of Shawnee County, Kansas, the county where the registered office of said corporation is located, stating that the amount of capital which the Articles of Incorporation of Alcore Homes Incorporated stated would be paid in before the corporation would commence had been fully paid in. Under Sec. 17-2806 of the General Statutes of Kansas, decedent, as a consequence of such failure, became personally liable for all sums due under the lease. It set out the statute verbatim. The total sum due under the lease is $56,050.00. The total sum due under the lease from March 1, 1958 to August 1, 1959, is $17,100.00 and from September 1, 1959, to January 1, 1963, is $38,950.00.

The Lease provides that "In the event the building upon the leased premises shall be destroyed or substantially destroyed by fire, windstorm or other casualty, then either party to this lease may terminate this lease by written notice to the other party of such termination, said notice to be given within ninety (90) days from the date of such destruction or substantial destruction." (A. 8):

"In the event of insolvency, bankruptcy, or assignment for the benefit of creditors by the Lessee, this lease shall terminate forthwith and the trustee in bankruptcy and all persons claiming, under, by or through him, as well as any or all persons claiming any right or title under the insolvency proceedings or under said assignment for benefit of creditors, shall be barred from any right, title or interest in this lease." (A. 8-9):

"In the event Lessee defaults in the payment of rent as the payments become due, Lessors may declare this

lease void and of no effect by giving to said Lessee a notice in writing and, in the event such default is not cured within three (3) days from the date of such notice, Lessors are given authority to take immediate possession of said real estate and any and all leasehold improvements and Lessee agrees to give peaceful possession thereof. In the event the Lessee shall default on any other of the provisions of this lease, except the payment of rent, Lessors may declare this agreement void and of no effect by giving thirty (30) days' notice in writing and, if such default is not cured within said thirty (30) days from date of such notice, Lessors are given authority to take immediate possession of said real estate and all leasehold improvements and Lessee agrees to give peaceful possession thereof. No waiver of a breach of any of the agreements or provisions contained in this lease shall be construed to be a waiver of any subsequent breach of the same or of any other provision in the lease." (A. 9);

and the lessors agree "to warrant and defend to the lessee the quiet enjoyment of the demised premises during the entire term of the lease." (A. 10). It is signed:

"/s/ Ellen M. Enoch (Seal)
Ellen M. Enoch
/s/ David W. Enoch (Seal)
David W. Enoch
Lessors.
Alcore Homes, Incorporated
By /s/ Glen P. Martin
President
Lessee
(Corporate Seal)
Attest:
/s/ George D. Jensik
Secretary
"

(A. 10-11)

The plaintiffs demanded that the defendants admit that a certified copy of the corporation's Articles of Incorporation as certified by the Secretary of State of Kansas, and other documents certified by him were genuine.

The Articles of Incorporation were filed November 4, 1957 (A. 33). According to it: The corporation was named the Alcore Homes Incorporated (A. 33). George D. Jensik was designated one of 3 incorporators (A. 38). His signature is purportedly affixed (A. 39). There were to be five directors (A. 38). It stated that the corporation's principal place of business would be Parsons, Kansas, and its registered office in Kansas would be Columbia Building c/o Roy N. McCue, Topeka, Kansas (A. 33). It provided that the amount of capital with which this corporation would commence business would be not less than the sum of One Thousand ($1,000.00) Dollars (A. 38). The nature of its business was specified in paragraph 5 (a)-(f) (A. 34): It intended to manufacture, sell, distribute, own, operate, or otherwise deal with structures, houses, buildings, for residential, dwelling or business purposes, and highway service units and highway diners, fabricated out of aluminum and other metals and materials; to make, manufacture, sell, distribute own, operate, or otherwise deal with mobile homes and trailers"; etc. (A. 34-35). The term for which the corporation was to exist was fifty (50) years (A. 38).

The other documents which the respondents requested the petitioner to admit were genuine were a receipt (Abs. 40) and application for shares (Abs. 41). The receipt was dated November 4, 1957, and acknowledged receipt by the Secretary of State of Kansas of the application fee, filing and recording fee, and capitalization fee, from Alcore Homes, Incorporated, and stated that the money had been deposited in the State Treasury.

The application for shares was made ostensibly by George D. Jensik for issuance of shares in Alcore Homes Incorporated to the Securities Commissioner of the State of Kansas, in which he stated that he was an "Officer Secretary-Treasurer" of "Alcore Homes Incorporated" (A. 41) and that he owned 1000 Units, each unit consists of 1 share of 7% Preferred Stock and 1 share of Class A, Common Stock, in the corporation (A. 41). It was to be paid in cash, at par, to wit: $12.50 per unit and payment had not been completed (A. 42). He had an oral understanding covering acquisition of additional shares—an agreement whereby he was to acquire an additional interest—(A. 42)—that I have advanced and expended some $1,600.00, toward advance organizational and preliminary expenditures for the corporation and before this phase is completed, I may be called upon for more money. This is to be reimbursed to me by the issuance of units, (1 share of Preferred and 1 share of Class A, Common Stock), at par, to wit: $12.50 per unit, in suitable number to be equal in money value the total amount which I shall so have advanced." (A. 44). His salary was to be $12,000.00 annually for services as Chief Personnel and to be in administrative charge of fiscal departments (A. 42). He was devoting part time to the corporation's business or affairs but would be engaged in such activities on a full time basis (A. 42). It was dated January 29, 1958 (A. 44).

The respondents also requested that petitioner admit that on and before the date of death of the decedent, George D. Jensik, the amount of the capital with which Alcore Homes Incorperated was to begin business, as stated in such corporation's articles of incorporation, was not paid in (Abst. 31).

The petitioner refused to admit the purported fact was true or the documents were genuine for want of knowledge (A. 45-46).

Ellen M. Enoch, in answering the interrogatories propounded to her by defendant stated:

My name is Ellen M. Enoch. My residence and business address is and between December 1957 and February, 1958, both inclusive, was 9 El Encanto Drive, Colorado Springs, Colorado. I am and during the period specified was a housewife. I own and during the period specified owned Lot 1 on Washington Avenue in Block 4 of Perry's addition to the city of Wichita, together with the building, fixtures and appurtenances located thereon and pertaining thereto. My husband, David W. Enoch, holds such right or interest in such property as he may have acquired as my husband under the laws of the State of Kansas. I acquired my interest in the real estate in 1948 approximately. My interest is the same as it was during the period specified. On or about the 27th day of January, 1958, I executed a lease to Alcore Homes, Inc., as Lessee under the terms of which the Lessee was authorized to use and occupy said premises for uses specified therein. I was represented by a firm as agent or broker in most of the Negotiations with Alcore Homes, Inc. preliminary to or at the time of the execution by me of the lease. My husband, David W. Enoch, negotiated a few of the final details directly by phone with Mr. D. Clifford Allison of the firm of Ratner, Mattox and Ratner, attorneys for the lessee, Alcore Homes, Inc. My agent or broker was Nestor R. Weigand of the firm of J. P. Weigand and Sons, Realtors, 110 North Main Street, Wichita 2, Kansas. Subsequently to the execution of the lease I have not entered into another lease of the entire property. However, a lease was entered into subsequenily for a small area in one end of the building. The lessee was Thermal Products, Inc., P.O. Box 736, Wichita, Kansas. The lease was executed 25 February 1959, for 1 year, April 1, 1959, to March 31, 1960. $600 rent was paid for use of one small room in the east end of the building at the rate of $50 a month. It was rented to be used for storage of supplies used in lessee's business,

which was conducted at another location. This use, though limited, helped to reduce lessors' insurance costs on the building and helped to reduce acts of vandalism on the property. I have advertised the demised premises as being available for use and occupancy on a rental basis or otherwise and I have discussed the availability of the premises on a rental basis or otherwise. I have advertised the demised premises for use and occupancy on a rental basis or otherwise continuously from approximately August 4, 1958, to the present date, October 3, 1960. I have discussed the availability of the premises for use and occupancy on a rental basis or otherwise with J. P. Weigand & Sons, Realtor, Mr. Nestor R. Weigand, August 4, 1958; Organ Realty, Mr. Leonard Organ, September 19, 1958; Mike Cassidy Realty, Mr. Mike Cassidy, June, 1959; Wheeler-Kelly Hagney, Mr. Sparling, July 21, 1959; Smith and Tray, Realtors, Mr. Ken White, November 9, 1959, Schuyler Jones, Realtors, Mr. Schuyler Jones, August, 1960. I have personally shown the property to prospective tenants or purchasers. All of the persons just identified have acted as agent or broker at one time or another in an attempt to lease or sell this property. Mr. Nestor R. Weigand has continuously had this property listed and has shown this property to numerous prospects. Each had an open listing with the understanding that a normal realtor's commission would be paid in the event of sale or lease. It was offered first for lease at $950 per month or sale for $110,000. Subsequent drop in the rental and sales market has made it necessary now to first locate a prospect and then negotiate the rental or sale price in relation to the existing market. I have no listing agreements which can be furnished. Some of the listings were made with realtors by phone, others by personal contact. They are the persons and firms listed above. Each person and firm conducts its own advertising and I am not acquainted with the names of the persons or corporations with which such advertising was placed. I do not have available any copies

of advertisements used by brokers and realtors. I, Ellen M. Enoch, signed this lease in my husband's (David W. Enoch) office at 315 Exchange National Bank Building, Colorado Springs, Colorado. The lease was sent to the law office of Ratner, Mattox and Ratner in Wichita, Kansas, for the signature of George D. Jensik. I do not know whether he signed the lease in this firm's office or not. I do not know at whose office or other establishment this lease was signed by Glen C. Martin. David W. Enoch, Ellen M. Enoch and L. Francis Smith secretary were present at the time the lease was signed by Ellen M. Enoch and David W. Enoch. I do not know who was present at the time Glen C. Martin signed the lease. This lease was first prepared by my husband, David W. Enoch, and we both signed it on January 27, 1958. The lease was mailed to Wichita, Kansas. The lease was retyped by lessee's attorney and I signed the retyped lease on or about February 6, 1958, at which time David W. Enoch also signed the retyped lease. The signature of Glen C. Martin, President of lessee, Alcore Homes, Incorporated, was then on the lease. The lease was returned to lessee's attorney and after the lessee's Secretary George D. Jensik, signed the lease, it was returned to us on or about February 20, 1958. I personally saw Ellen M. Enoch and David W. Enoch affix their signatures to the lease. (A. 51-56).

David W. Enoch, in answering the interrogatories propounded to him answered most of the questions the same way that his wife had done but added:

My name is David W. Enoch. My business address is and between December 1957 and February, 1958, both inclusive, was 315 Exchange National Bank Building, Colorado Springs, Colorado. My residence address is and between the dates specified was 9 El Can[illegible] Drive, Colorado Springs, Colorado. I am and during the period specified was an attorney. I first prepared the lease on January 27, 1958, on which day

Ellen M. Enoch and I signed the lease. On this date the original and two copies were mailed to our agent, Mr. Nestor R. Weigand, for delivery to the attorneys Ratner, Mattox and Ratner for approval and signatures of the lessee. Since the lease was prepared without the benefit of a personal conference with lessee's attorneys, I asked that said attorneys call me direct if any changes were to be made in the lease provisions. February 1, 1958, Mr. D. Clifford Allison of the firm of Ratner, Mattox and Ratner, called me long distance and discussed three minor changes desired in the lease provisions. These changes were agreed to and Mr. Allison then retyped the lease agreement with the changes and retyping in the original date of January 27, 1958. February 4, 1958, Mr. Allison delivered the original and two copies of the retyped lease to our Realtor, Mr. Weigand, along with a $950.00 check in payment of the first month's lease payment. When the retyped lease was received in Colorado Springs on or about February 6, 1958, Ellen M. Enoch and I signed the original and one copy and discovered that though the lease had been signed by Glen C. Martin as President of Alcore Homes, Incorporated, the lease had not been signed by the Secretary of the lessee, February 7, 1958. The original and two copies of the lease were mailed directly to Attorney D. Clifford Allison in Wichita, Kansas, for the signature of the Secretary. February 20, 1958. Our Realtor, Mr. Weigand mailed to us one counterpart of the lease completely executed by Glen C. Martin as President and George D. Jensik as Secretary of the lessee. The lease had been delivered to Mr. Weigand by Mr. Allison as attorney for lessee. The lease in question was actually signed by Ellen M. Enoch and myself on February 6, 1958; by Glen C. Martin between February 1, and February 4, 1958, and by George D. Jensik between February 7, 1958, and February 20, 1958. (A. 57-63)

A fuller statement of constitutional questions raised and where is set out in the Argument under Point IV, pages 36-41.

ARGUMENT.

I.

THE ILLINOIS COURTS HAD NO JURISDICTION TO ENTER AND AFFIRM AND REFUSE TO REVIEW FURTHER THE SUMMARY JUDGMENT IN THIS CASE BECAUSE THERE WAS NO ADMISSION, CONSENT, OR DEFAULT, ON WHICH IT COULD BE PREDICATED.

Petitioner insists that she was not required to file any answer specifically denying any allegation in the claim unless the court ordered her to do so and all she was required to do was to object, orally or in writing, to the allowance of the claim, which she did, and that the answer she filed, raising defenses going to the jurisdiction of the court or in abatement only, by express statutory provision, did not admit any allegation of fact in the claim. The Illinois Appellate Court held to the contrary, stating: "All of the allegations of fact in the verified claim are admitted by the administratrix by her failure to deny them in her answer or amendment thereto." (Opinion, App. p. 1)

On March 16, 1962, the Chicago Daily Law Bulletin carried a front page article by Stanley L. Lind, concluding:

> "Apparently in a novel ruling which was contrary to the custom of the Probate Court for many years, the Court held that since the administratrix chose to Answer the verified claim, all allegations of fact which were not denied will be admitted."

Mr. Lind's comment on the custom is correct and his explanation undoubtedly the one on which the Court acted.

49 C.J. 299 states:

> "Statutes or rules of court requiring an affidavit of defense sometimes expressly exempt actions against executors and administrators from their operation, and where no express exemption is made such actions have been uniformly held not to have been within the legislative intent where the cause of action arose before the death of decedent."

Section 5 of the Illinois Probate Act provides:

> "The provisions of the Civil Practice Act and all existing and future amendments and modifications thereof, and the rules now or hereafter adopted pursuant to that Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act . . ."

Section 4 of the Probate Act provides that the Supreme Court of Illinois has power to make rules of pleading, practice and procedure for the probate courts subject to which "the probate courts may make such rules regulating dockets, calendars, and the conduct of their business as they may deem expedient to carry out the provisions of this Act". Probate rules have the force of a statute and are binding upon the parties and the courts. *In re Young's Estate*, 1953, 414 Ill. 525. Section 5 of the Probate Act, therefore, provides that the provisions of the Civil Practice Act and the rules adopted pursuant to it shall apply to all proceedings in the Probate Court except as otherwise provided in the Probate Act or rule of court.

Section 1 of the Illinois Civil Practice Act provides: "The provisions of this Act apply to all civil proceedings, both at law and in equity, in courts of record, except . . . proceedings in which the procedure is regu-

lated by separate statutes. In all those proceedings the separate statutes control to the extent to which they regulate procedure, but this Act applies as to matters of procedure not so regulated by separate statutes. As to matters not regulated by statute or *rule of court*, the practice at common law and in equity prevails." (Italics ours.) Section 1 of the Civil Practice Act, therefore, provides that the Civil Practice Act shall not apply to matters of procedure in the Probate Court regulated by the Probate Act or Rule of Court.

Section 192 of the Probate Act provides: "Every claim filed shall state the nature of the claim, and shall be accompanied by an affidavit of the claimant or by any person having knowledge of the facts that the claim is just and unpaid after allowing all just credits, deductions and setoffs." Section 196 provides: "The executor . . . or any other person whose rights may be affected by the allowance of a claim may file pleadings with the clerk of this court. A claim or counterclaim may be filed in favor of the estate and against any claimant named in the claim. . . . The court may permit the filing of pleadings at any time before judgment on a claim or counterclaim." Section 3a provides: "On the court's own motion or on motion made by interested person, before or during any hearing, any person who desires to oppose the entry of an order, judgment or decree by the court shall file, as directed by the court, a pleading disclosing the grounds of opposition." Section 199 provides: "On call of a claim it may be allowed, set for trial, continued, or dismissed. A claim . . . to which no pleading has been filed within the time provided by this Act may be taken as proved or the court may require the claimant to prove his claim." Rule 54 of the Probate Court of Cook County provides: "1. In each month . . . the

Clerk shall prepare a calendar of all claims filed which are at issue or as to which the time for filing pleadings has expired. . . . On the call of the calendar, claims appearing thereon will be allowed, set for hearing, continued, or dismissed, as the case may be. Contested claims will not be heard on the call of the calendar but will be set for hearing. Unless written consent or objection to the allowance of a claim on the calendar has been filed, it shall be the duty of the attorney for the legal representative in each estate appearing on the calendar to be present in court when the calendar is called and to voice his consent or objection to the allowance of the claim."

A claimant, therefore, must file a verified statement of claim. An executor may, but is not required to, file pleadings with the clerk of the court. Any interested person may file pleadings with the clerk of the court and, if made in opposition to entry of an order, judgment or decree, must do so. A claim to which no pleading has been filed may be taken as proved unless the representative of the estate has filed written obbjection to the claim or his attorney is present in court when the calendar is called and orally objects to the allowance of the claim or the court requires the claimant to prove it. An executor, therefore, is not required to file any pleading, verified or unverified, in opposition to a claim in the Probate Court of Cook County, unless ordered to do so by the Court, but may file a written objection to the claim, or appear and orally object when the claim is called, and have it set down for hearing on his objection.

It follows that, in the absence of any order of court requiring him to file a written answer to the claim, Sections 35 and 40 of the Civil Practice Act have no

application to mere oral or written objection made by an executor to the allowance of a claim in the Probate Court since they are meaningless where no pleading is required.

It follows that Section 45(5) of the Civil Practice Act providing for judgment on the pleadings, and Section 57 of the Civil Practice Act providing for summary judgment, are not applicable to proof of claims in the Probate Court of Cook County, where the court has not ordered an answer to be filed, because there can be no admission of fact by failure to plead, or failure to plead specifically, under such circumstances, unless an answer is filed.

The Appellate Court sought to avoid the result because petitioner did file an Answer, stating:

> "All of the allegations of fact in the verified claim are admitted by the administratrix by her failure to deny them in her answer or amendment thereto." Opinion, p. 1a.

holding, in brief, that in filing an answer she subjected herself to the provisions of that Act as far as her pleadings are concerned, and is, accordingly, governed by them, regardless of whether she was required, in the first instance, to file any pleading or not. The position is wholly untenable because Section 43(3) of the Civil Practice Act provides:

> "An answer containing only defenses to jurisdiction of the subject matter or in abatement does not constitute an admission of the facts alleged in the complaint,"

and that is precisely the nature of defendant's answer as amended. (Abs. 16-21). It follows, it does not constitute an admission of the facts alleged in the claim.

Petitioner insists that for the Court to hold that she admitted the allegations of fact in the claim, by not filing any answer denying any allegation of fact in the claim because Sections 35 and 40 of the Civil Practice Act taken above ostensibly require her to do so, although the Probate Act and Rule 54 of the Probate Court of Cook County do not require her to do so, is to deny defendant and those whose interests she represents procedural due process and the equal protection of state law, with resultant deprivation of their property by state action, in violation of the 14th Amendment, Section 1, of the Constitution of the United States, for lack of any reasonably certain procedural guide by which to defend the action.

II.

THE ILLINOIS COURTS HAD NO JURISDICTION TO ENTER AND AFFIRM AND REFUSE TO REVIEW FURTHER THE SUMMARY JUDGMENT IN THIS CASE BECAUSE THERE WAS NO EVIDENCE ON WHICH IT COULD BE PREDICATED.

Rule 15 of the Supreme Court of Illinois provides that affidavits made in support of a motion for summary judgment shall be made on the personal knowledge of the affiants "and shall affirmatively show that the affiant, if sworn, as a witness, can testify competently thereto." The plaintiffs, in their motion for summary judgment (A. 64-65), state that they "rely upon . . . 1. Verified Statement of Claim of Ellen M. Enoch and David W. Enoch. . . . 5. Answers to Interrogatories Propounded by the Administratrix of the Estate of George D. Jensik, Deceased, and Served Upon the Claimant David W. Enoch on June 15, 1960. 6. Answers to Interrogatories Propounded by the Administratrix of the Estate of George D. Jensik, De-

ceased, and Served Upon the Claimant Ellen M. Enoch on June 15, 1960."

Edward W. Cleary in his Handbook of Illinois Evidence states:

> "Section 2 of the Evidence Act creates an important exception to the general rule that parties and interested persons are competent witnesses. Ill. R. St. 1955, c. 51, § 2.
>
> "This so-called 'Dead Man's Act' provides that in civil cases 'No party . . . or person directly interested in the event thereof, shall be allowed to testify of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends' as representative of a deceased or incompetent person.
>
> • • •
>
> "A party who is incompetent to testify of his own motion or in his own behalf is also incompetent to testify on behalf of a co-party. *Sullivan* v. *Corn Products Co.*, 245 Ill. 9, 91 N.E. 643 (1910).
>
> • • •
>
> ". . . taking a deposition in advance of trial is not a waiver of incompetency. *Pink* v. *Dempsey*, 350 Ill. App. 405, 113 N.E. 2d 334 (1953)" pp. 22, 23 and 27.

The Statement of Claim is verified by the joint affidavit of Ellen M. Enoch and David W. Enoch, the respondents, and by nobody else (A. 4). The Answers to Interrogatories Propounded to David W. Enoch are verified by him and by nobody else (A. 63). The Answers to Interrogatories Propounded to Ellen M. Enoch are verified by her and by nobody else (A. 56). Petitioner is defending as representative of a deceased person, George D. Jensik. The Section applies and both respondents are rendered incompetent to testify on their own behalf or on behalf of each other and their incompetency has not been waived by petitioner in propounding interrogatories to them.

The claim was under oath and the answers given to the interrogatories were under oath, and the plaintiffs relied on both in their motion for summary judgment, so the statement of claim and the answers to the interrogatories are *affidavits*. They are in the nature of evidence. *Kohler v. Jacobs,* (1943, C.A. 5 Ga.), 138 F. 2d 440.

Section 57 of the Illinois Civil Practice Act (17a) is similar to Rule 56 of the Federal Rules of Civil Procedure. The Federal and Illinois State Court procedure is so similar, the Illinois forms of motions and affidavits may be used in the Federal courts. 1956 Replacement Civil Practice Forms Annotated, Vol. 2, Elson and Lassers, pp. 644, 824. Rule 56 of the Federal Rules of Civil Procedure authorizes the entry of summary judgment for a party where the pleadings, depositions and admissions, together with affidavits, if any, show "there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Section 57(a)-(c) of the Illinois Civil Practice Act also provides that the pleadings, depositions and admissions, together with affidavits, if any, show "there is no genuine issue as to any material fact and that the moving party is entitled to judgment or decree as a matter of law." Rule 56 of the Federal Rules of Civil Procedure provides that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein." Supreme Court of Illinois Rule 15-(17a) also provides that affidavits "shall . . . consist . . . of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." An answer to a motion for summary judgment cannot be considered where it fails affirmatively to show that the affiant, if

sworn as a witness, could testify competently thereto. *Bergesen* v. *Clauss*, 15 Ill. 2d 337, 155 N.E. 2d 20, 68 ALR 2d 446.

The respondents are not clearly competent to testify to all transactions that occurred after the death of the decedent. They are not entitled to testify to anything that occurred after the death of the decedent to prove anything that occurred before the death of the decedent. All the answers to the interrogatories, other than those by which respondents identified themselves, either involve matters that occurred prior to death or matters that occurred after by which it is sought to prove what went before. If the answers to the interrogatories are evidence, they are subject to the Dead Man's Statute.

The most important issue of fact is whether the plaintiffs have made a diligent and reasonable effort to release the premises and mitigate their damages.

The Statement of Claim alleges:

> "Claimants subsequently attempted to lease said premises to others in order to mitigate their damages but have been unable to do so." (A. 2).

This allegation is not an allegation that they used such diligence as would be exercised by reasonably prudent men under similar circumstances, an essential element in stating a cause of action against a tenant in Kansas, and not admitted by failure to answer or, if the court please, by answer and failure to deny. 40 ALR 198, 207; 126 ALR 1219, 1222.

In *Lawson* v. *Callaway*, 1930, 131 Kan. 789, 293 P. 503, the Court ended its opinion by saying:

> "While the rule declared in Kansas appears to be in conflict with the weight of authority in the United

States, it has been so long declared and so consistently followed that it has become a rule of property and should not now be overruled."

Accordingly, the pleadings allege nothing to support the statement of fact made by the court in its opinion (A. 10):

> "She asks us to disregard the uncontradicted evidence and assume that the listing of the property with various reputable realtors in Wichita was not a sufficient effo: by claimants to mitigate their damages . . . the court properly concluded that the facts established a reasonable effort to mitigate the damages as requires by the Kansas cases."

and the summary judgment, and it must be concluded that the Appellate Court consid d the defendant's interrogatories and plaintiffs' answers thereto in reaching that conclusion and in affirming the judgment.

III.

INSOLVENCY OF THE CORPORATION IS SHOWN BY RESPONDENTS' OWN PLEADING AND PROOF AND IS A COMPLETE DEFENSE, NOT REQUIRED TO BE RAISED IN THE PROBATE COURT SINCE IT APPEARS ON THE FACE OF THE RECORD AND DEFEATS THE CLAIM, BECAUSE THE LEASE WAS EITHER STILL BORN OR TERMINATED BEFORE OR ON MARCH 1, 1958, BY ITS OWN TERMS, BY REASON OF THE INSOLVENCY OF THE CORPORATION AND THE PROVISIONS OF SECTION IX OF THE LEASE, DISCHARGING THE CORPORATION FROM ANY FURTHER LIABILITY UNDER THE LEASE AND DISCHARGING THE DECEASED FROM ANY POSSIBLE STATUTORY LIABILITY PREDICATED UPON IT.

Section IX of the Lease entitled "Insolvency" (A. 8) provides:

> "In the event of insolvency, bankruptcy, or assignment for the benefit of creditors by the Lessee, this

lease shall terminate forthwith and the trustee in bankruptcy and all persons claiming under, by or through him, as well as any or all persons claiming any right or title under the insolvency proceedings or under said assignment for the benefit of creditors, shall be barred from any right, title or interest in this lease."

In re Walker, 2 Cir. 1937, 93 F. 2d 281, 283, the Court said:

> "The insolvency mentioned in the lease cannot have been other than a failure to meet the lessee's obligations as they matured; that is the insolvency which throws the lessor's relations into confusion, delays payment of the rent, impounds his property for an indefinite time, and in general makes it important for him to be free to reenter."

See also *In re Wil-Low Cafeteria*, 2 Cir., 1938, 95 F. 2d 306, 308, 115 ALR 1184, 1187.

Applying that test, the corporation was either insolvent when it made the first payment of rent on February 4, 1958, and in the absence of insolvency would have become a binding obligation of the corporation, or became insolvent on March 1, 1958, when it defaulted in making payment of rent, and the lease was either still-born or terminated on March 1, 1958.

See 115 ALR 1189; 168 ALR 504.

The complaint alleges: "The Lessee paid the sum of $950.00 due February 1, 1958, but has paid no further sums due under said lease" (A. 2). The rent due March 1, 1958, was $950.00 (A. 6). The Articles of Incorporation provided: "The amount of capital with which this corporation will commence business will be not less than the sum of One Thousand ($1,000.00) Dollars" (A. 38).

On February 1, 1958, therefore, all but $50.00 of the $1,000.00 capital required had been paid into the corporation. On March 1, 1958, the corporation defaulted in payment of rent. It may be inferred it did not have sufficient funds to pay the rent. If so, it was insolvent on that date. This conclusion is supported by certain certified copies of documents filed in the office of the Secretary of State of Kansas which respondents requested petitioner to admit were genuine (A. 32-44). She did not admit they were genuine but she did not say they were not. Having requested her to admit they were genuine, respondents can hardly assert that they are not. The Secretary of State of Kansas noted on the back of the Articles of Incorporation (A. 40) that an application fee of $25.00, and a filing and recording fee of $2.50, and a capitalization fee of $425.00, making a total sum of $452.50, had been paid to him and deposited in the State Treasury on November 4, 1957. This brings the total amount of capital paid in and paid out to and including February 1 (or 4), 1958 to $1430.00, but still leaves the corporation with only $50.00 on hand after payment of the February 1958 rent and insolvent on March 1, 1958.

But, barring duplication in payment, the corporation was actually insolvent on February 1 (4), 1958. George D. Jensik alone had paid in a minimum of $1,600.00 by January 29, 1958. According to the application purportedly made by him under oath to the Securities Commission of Kansas dated January 29, 1958, he had advanced and expended some $1,600.00 toward advance organizational and preliminary expenditures for the corporation (A. 44), "to be reimbursed to me by the issuance of units, (1 share of Preferred and 1 share of Class A, Common Stock), at par, to wit: $12.50 per unit, in suitable number to be equal in money value the total amount which I shall so have advanced" (A. 44). $1430.00 from

$1600.00 leaves a deficit of $170.00 on February 1 (or 4), 1958. Deducting the $50.00 cash on hand leaves a total deficit of $120.00.

In *Murray Realty Co.* v. *Regal Shoe Company*, 1934, 265 N.Y. 332, 335, the Court of Appeals said:

> "The question must be determined by the language of the lease. As Lehman, J., said in *James* v. *Paddell* (67 Misc. Rep. 420, 422): 'It cannot be disputed that the parties have a right to provide either that the lease shall terminate at the happening of an event or that the event shall give the landlord the option of terminating it. The intent of the parties can be determined only from the language of the lease.'
>
> It is easy for the draughtsman of a lease to provide that an adjudication in voluntary bankruptcy shall terminate the lease only if the landlord shall so elect. That is not the language of the lease before us. By a process of judicial construction plain words—'*ipso facto* and terminate'—are made to read as if they were the lessor's covenant merely. We are constrained to accept the construction of the trial justice and say that the clause under consideration is a conditional limitation by reason of which the lease expired upon an adjudication that the lessee is bankrupt. Bankruptcy constitutes a breach of the lease. It therefore ends and terminates, *ipso facto*."

In re Outfitters' Operating Realty Co., 69 F. 2d 90, 91, Judge L. Hand, in discussing the words of a lease which provided:

> "It is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolveney by or against the lessee shall be deemed to constitute a breach of the lease, and thereupon, *ipso facto*, . . . this lease shall become and be terminated."

says,

> "the mere filing of a petition in bankruptcy puts an end to the lease; not at the lessors' option, but unconditionally."

In *Judd* v. *Mutual Bank & Trust Co.*, 1932, 114 Conn. 553, 560, the Supreme Court of Connecticut construed the following provision in a lease: "This lease is made further upon the express condition that in the event of an assignment for the benefit of creditors of the party of the second part for voluntary or involuntary liquidation, forthwith and immediately this lease shall expire and terminate and the party of the first part be entitled to immediate possession and occupancy of the within premises." The Court said:

> "Upon this record the defendant is entitled to an opportunity to demonstrate, if it can, consistently with the rules governing such inquiry, that the clause may and should be construed as expressing intention that the lease be terminated by the occurrence of the stipulated event, without entry or other action by the plaintiff lessor."

In *Blond* v. *United States Fidelity & G. Co.*, 1935, 336 Mo. 684, 80 S.W. 2d 675, 99 ALR 36, 41, the Court said:

> "It is well settled law that a forfeiture of a lease by the lessor and his taking possession of the leased premises without any reservation in favor of the lessee terminates absolutely the relation of lessor and lessee and discharges all the obligations of the lessee, not breached."

The liability of the corporation having been terminated pursuant to its terms by the happening of the contingency specified any possible statutory liability of the deceased

was extinguished with it and the claim should have been denied.

But the Appellate Court states:

> "Here the appellant raises an affirmative defense not pleaded or raised in the trial court. The argument that the lease terminated because of the insolvency of the corporation is based upon deductions from a document not in evidence, which the administratrix refused to admit was genuine. The argument ignores Kansas law which made the lease as much decedent's primary obligation as if he had executed it in his own name." Opinion, 7a.

The statement is the epitome of error. It is incorrect from beginning to end.

1.

> "Here the appellant raises an affirmative defense. . . ." Opinion, 7a.

Insolvency of the corporation is not an affirmative defense because the test of whether a defense is affirmative and so has to be pleaded by defendant is whether the defense gives color to the opposing party's claim and then asserts *new matter* by which the apparent right is defeated. *Cunningham* v. *City of Sullivan*, 1958, 15 Ill. App. 2d 5a. Insolvency of the corporation appearing on the face of the complaint, it is not new but old-matter here that defeats the claim and, hence, by definition, it is not an affirmative defense.

But it is useless to quibble because *new matter* need not be specifically pleaded where "*such matter is shown by plaintiff's own proof*" (71 C.J.S. 337; 49 C.J. 291)—"*or by his pleading and proof*" (71 C.J.S. 337).

2.

"Here the appellant raises an affirmative defense not pleaded or raised in the trial court." Opinion, 7a.

Insolvency of the corporation was pleaded and raised in the trial court by claimants in their statement of claim. True, the obvious went unnoticed but it was always there, ready to be recognized as an inherent defect in the claim.

But it was not required to be pleaded or raised in the Probate Court.

In the first place a motion for summary judgment searches the record (91 ALR 884; 41 Am Jur 526). In the second place there has been no trial and petitioner has advanced no theory or acquiesced in any theory other than that advanced by the plea of a general issue. In the third place it is based on the plaintiffs' theory of the case merely carrying it to its logical conclusion. In the fourth place it is not a theory, but merely another argument. In the fifth place, if it is a theory, it is not inconsistent with any theory advanced by the defendant in the lower court. In the sixth place, if it is a theory, it is a theory of law and not of fact, determinative of the action, by which the plaintiff has not been prejudiced by the failure to raise it in the trial court because it is incurable, and hence an exception to the general rule. See 4 C.J.S. 727.

3.

"The argument that the lease terminated because of the insolvency of the corporation is based upon deductions from a document * * *." Opinion, 7a.

Insolvency of the corporation is not based on deductions from any document other than the lease which is part

of the claim, Section 36 of the Civil Practice Act providing:

> "The exhibit consitutes a part of the pleading for all purposes."

All other documents relied upon can be disregarded as not essential to the argument. The insolvency of the corporation is established by the statement of claim, the lease which is part of the statement of claim, the receipt of the first month's rent which is part of the lease and the inference urged by respondents and adopted by the Court in its opinion from an allegation of the statement of claim that the capital required to be deposited before the Corporation could commence to do business had never been paid in.

Respondents argued and the Appellate Court states:

> "A reasonable inference from the failure to file the affidavit is that the required capital was never paid into the corporation, and that therefore no such affidavit could be made or filed." Opinion, 4a.

So be it. If the inference is drawn to sustain the judgment it must be drawn, if necessary, although it will defeat it.

If the money was never paid in, the corporation had no assets and begged, borrowed, or, respondents assert, stole, $950.00 to pay the first month's rent, but was unable to beg, borrow or steal money to pay the second and subsequent months' rent. It follows that the corporation was either insolvent when the first payment was made or when the second payment became due, and the lease either never went into effect or automatically terminated pursuant to its terms.

4.

"The argument that the lease terminated because of the insolvency of the corporation is based upon deductions from a document not in evidence, which the administratrix refused to admit was genuine." Opinion, 7a.

Insolvency of the corporation is not based on deductions from any document which the administratrix refused to admit was genuine, as above stated, but it is confirmed by such a document (Abst. 32-44), and the document is in evidence as a public record under Illinois Supreme Court Rule 18(2) and as an admission on file under Section 57 of the Illinois Civil Practice Act.

The admissions are on file and in evidence because the statute provides that summary judgments be based on the pleadings, depositions, and *admissions on file*, together with the affidavits, if any" (§57(3) C.P.A.). (Italics ours). And as a public document, the court may take judicial notice of it whether technically in evidence or not.

The respondents have taken the position that:

"On and before the death of the decedent, George D. Jensik, none of the capital with which Alcore Homes Incorporated was to begin business, as stated in such corporation's articles of incorporation, was paid in." (Abs. 31),

by requesting petitioner to admit it in their request filed June 3, 1960 (Abs. 31-44) and cannot deny that the statement is true when it is used against them to defeat their claim.

5.

"The argument ignores Kansas law which made the lease as much decedents' primary obligation as if he had executed it in his own name." Opinion, 7a.

It is our position, of course, that Kansas law does nothing of the kind, but assuming the statement to be a correct statement of Kansas law, petitioner's argument does not ignore it.

The contractual liability, if any, created by the statute does not exist unless there is a corporate liability or debt. The statement is self-evident for the statute merely provides that the officers and directors "Shall be severally liable for the debts or liabilities *of the corporation*" (Abs. 4) (Italics ours).

It necessarily follows the individual liability is never greater than the corporate liability or debt. It follows further, it ceases to exist with the extinction of the corporate liability or debt. Otherwise, it would be, as petitioner for other reasons insists that it is, a penalty, a liability that did not survive the death of the deceased.

The lease controls. It provides that in the event of insolvency of the corporation it shall terminate forthwith. The corporation being insolvent on or before March 1, 1958, the lease immediately terminated and ended all unaccrued corporate liability under it pursuant to its terms. There is nothing left on which to predicate any statutory or common law liability against anybody else. Insolvency of the corporation automatically discharged any liability of the corporation and its officers, directors, and stockholders.

This conclusion is confirmed by the authorities.

Fletcher states:

> "Officers may make any defense which the corporation might have made against the original indebtedness." William Meade Fletcher, Cyclopedia of the Law of Private Corporations, 1947 Replacement Volume by Morton S. Wolf, Vol. 3, published by Callaghan and Company, 1947, p. 11 (citing *Jones* v. *Barlow*, 62 N.Y. 202).

"Under a statute making stockholders liable for corporate debts, there can be no liability for a claim against the corporation when it ceases to be a corporate debt. Anything, therefore, which releases or discharges a corporation from liability for a corporate debt necessarily releases or discharges the stockholders, unless there is some provision to the contrary. Such has been held the effect of a release of the payment of a corporate debt by a surety, in jurisdictions where such payment operates to extinguish the debt." William Meade Fletcher, Cyclopedia of the Law of Private Corporations, 1961 Revised Volume by Morton S. Wolf, Volume 13 A, published by Callaghan & Company, pp. 426-427 (citing *O'Donnell Shoe Co.* v. *Benson Co-op. Mercantile Co.*, 175 Minn. 382, 221 N.W. 420; *Mohr* v. *Minnesota Elevator Co.*, 40 Minn. 343, 41 N.W. 1074; *Yule* v. *Bishop*, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094).

To construe the statute, as the Appellate Court has construed it, to create a contractual liability against the officers, directors, and stockholders, after the corporate liability upon which it is predicated has ceased to exist, in the absence of any provision in the lease that it shall continue to exist against them, would render the statute unconstitutional as a violation of Article I Section 10 of the Constitution of the United States providing that no State shall pass any law impairing the obligation of contracts, in that, the parties to the contract having contracted together without reservation that the lease shall terminate forthwith the statute would impair the obligation of the contract that the lease shall terminate forthwith.

IV.

PETITIONER AND THOSE SHE REPRESENTS HAVE BY STATE ACTION BEEN DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND HAVE BEEN DENIED THE EQUAL PROTECTION OF THE LAWS OF ILLINOIS, IN VIOLATION OF THEIR FEDERAL RIGHTS UNDER THE 14TH AMENDMENT SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES.

Several specific constitutional questions have been raised at various times in this litigation. There is an inherent constitutional question—lack of jurisdiction.

The inherent constitutional question was raised in the Probate Court of Cook County and at every stage of the proceedings in the State Courts. The first specific constitutional question was raised in the Petition For Rehearing in the Appellate Court. The second specific constitutional question was raised in the Motion To Vacate the judgment of the Appellate Court. The third specific constitutional question was raised in the Petition For Leave To Appeal to the Supreme Court of Illinois (which also, by order of the Supreme Court of Illinois, stood as Petitioner's Brief and Argument in that Court in support of her appeal to that Court as a matter of constitutional right).

On February 23, 1962, the summary judgment was affirmed. A Petition For Rehearing filed March 10, 1962, was denied March 20, 1962. It raised a question involving a construction of the Constitution of the United States. The question was

> Whether the holding of the Appellate Court that Petitioner admitted the allegations of fact in the claim, although she did not intend to admit anything, by not filing any answer denying any allegation of fact in the claim, on legal advice that she was not

required to file any such answer, because Sections 35 and 40 of the Civil Practice Act (Illinois) require her to do so, although the Probate Act and Rule 54 of the Probate Act do not require her to do so, is to deny to Petitioner and those she represents, procedural due process and the equal protection of state law, with resultant deprivation of their property by state action, in violation of Article II, Section 2 of the Constitution of the State of Illinois and the 14th Amendment, Section 1 of Constitution of the United States, for lack of any reasonably certain procedural guide by which to defend the action.

On April 13, 1962, Petitioner filed a motion to vacate the judgment of February 23, 1962, and it was denied on April 13, 1962. It claimed the Probate Court and the Appellate Court had exceeded their jurisdiction and raised a question involving a construction of the Constitution of Illinois and a construction of the Constitution of the United States. The question is:

Whether, it being a summary judgment based on purported admissions of fact, implied in law and not in fact, over the objection of the party charged with making the admissions, against her actual known intent, predicated on her filing an answer limited to matters going to the jurisdiction of the subject matter and in abatement only, which by statute did not admit any allegation of fact, and on her failure to file any answer specifically denying any allegation of fact, which by rule promulgated pursuant to statute, and having the force of statute, did not need to be filed, and on the claimants' own written answers to written interrogatories propounded by her for discovery purposes only, the claimants being incompetent to testify under the Dead Man's Act, the Probate Court exceeded its jurisdiction in granting relief for or against anybody by summary judgment for want of any basis for adjudicating and any authority to adjudicate in the absence of any

> default, pleading, admission or evidence to support a judgment, and the Appellate Court exceeded its jurisdiction in affirming the judgment for want of any basis for adjudicating and any authority to adjudicate in the absence of any default, pleading, admission or evidence to support a judgment, its power to review a void judgment on appeal being limited to reversing the judgment, as a result of which the Probate Court of Cook County in entering the summary judgment and the Illinois Appellate Court in affirming it, have by state action deprived her and those she represents of their property without due process of law, and have denied them the equal protection of the laws of the State of Illinois, in violation of their state rights under Article II, Section 2 of the Constitution of the State of Illinois, and of their federal rights under the 14th Amendment, Section 1, of the Constitution of the United States.

In brief, the summary judgment was entered and affirmed over Petitioner's objection, on a supposed admission, implied in law and not in fact, *where there is no foundation on which it could be predicated.*

The third specific constitutional question was raised in the Petition For Leave To Appeal at pages 70-71 based on the construction given the Kansas statute by the Illinois Appellate Court. This is the question:

> Whether, to construe the statute, as the Appellate Court has construed it, to create a contractual liability against the officers, directors, and stockholders, after the corporate liability upon which it is predicated has ceased to exist, in the absence of any provision in the lease that it shall continue to exist against them, would render the statute unconstitutional as a violation of Article I Section 10 of the Constitution of the United States providing that no State shall pass any law impairing the obligation of

> contracts, in that, the parties to the contract having contracted together without reservation that the lease shall terminate forthwith [upon insolvency of the corporation] the statute would impair the obligation of the contract that the lease shall terminate forthwith [upon insolvency of the corporation, and it being obvious that the corporation was insolvent when the contract was entered into or became insolvent within thirty days thereafter, if respondents' documents presented for admission to be genuine, and the lease attached to the complaint, are genuine, and the facts submitted for admission to be true, are true]. (Inserts in brackets inserted here for explanatory purposes.)

Assuming the Illinois Appellate Court has misconstrued the Kansas statute, the question just stated has a corollary:

> Whether the State of Illinois has, by judicial action, impaired the obligation of the contract that the lease shall terminate forthwith upon insolvency of the corporation, and, accordingly, deprived Petitioner and those she represents of their property without due process of law, and has denied them the equal protection of the laws of the State of Illinois, in violation of their federal rights under the 14th Amendment, Section 1, of the Constitution of the United States.

All questions except the last two questions are merely refinements of the jurisdictional issues inherent in the case, that may be raised at any time. The last two questions arise as a result of the interpretation placed on the lease by the Illinois Appellate Court, the effect of the lease not having been considered by the Probate Court but being a question of law appearing on the face of the record that can be raised for the first time on appellate review.

These constitutional questions all come to the same thing —deprivation of fundamental substantive and procedural rights. They may be summarized as follows:

The summary judgment was entered and affirmed over petitioner's objection, on a supposed admission, implied in law and not in fact, where there is no foundation on which it could be predicated. There is, therefore, nothing in this record which authorized the Probate Court of Cook County to enter or the Appellate Court of Illinois, First District, to affirm a summary judgment—no admission, agreement, consent, default, evidence, inference, or pleading or lack of pleading, whatsoever—with the result that the Probate Court of Cook County exceeded its jurisdiction in entering, and the Appellate Court, First District, exceeded its jurisdiction in affirming, and the Supreme Court of Illinois exceeded its jurisdiction in dismissing further appeal as a matter of right from, the summary judgment, and consequently, by state action, deprived the petitioner and those she represents of their property without due process of law and denied to them the equal protection of the laws of the State of Illinois, in violation of their federal rights under the 14th Amendment Section 1 of the Constitution of the United States.

Furthermore, the Illinois courts and Legislature have failed to establish any reasonably certain procedural guide by which petitioner could defend the action, and the Illinois courts have impaired the allegation of the lease that it shall terminate forthwith upon the insolvency of the corporation, with the same effect.

REASONS WHY THIS PETITION SHOULD BE GRANTED.

The Illinois courts have decided substantial Federal constitutional questions not previously decided by this Court and has decided them and other Federal constitutional questions not in accord with applicable constitutional principles as stated in decisions and rules of this Court. There has been an abuse and failure of judicial power and a complete disregard of jurisdictional requirements and the Federal constitutional guarantees of due process of law and the equal protection of state laws. The decision should be corrected before it hardens into a precedent in other summary judgment cases in Illinois and elsewhere. The close relationship between the summary judgment procedure adopted by the Federal Rules of Civil Procedure and that adopted by the Illinois Legislature and the Illinois courts tend to require the intervention of this Court. Summary judgment is a necessary and important judicial tool in both State and Federal courts, but it is a dangerous tool which must be strictly limited to its proper use. The rules governing it must be precise and should be uniform.

The basic question whether the protection afforded against impairment of the obligation of a contract by state legislative action by Article I Section 10 of the Constitution of the United States as afforded against impairment of the obligation of a contract by state judicial action by the 14th Amendment Section 1 to the Constitution of the United States, involving as it does the question whether this Court has jurisdiction to review such action alone warrants the granting of a writ of certiorari. The same problem is presented in *Griffith* v. *Harris*, 1962, October Term, Misc. Docket No. 1006, in a positive form.

CONCLUSION.

The petition should be allowed and the judgments of the Probate Court and Appellate Court and Supreme Court of Illinois reversed for the reasons stated.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE APPELLATE COURT

MR. JUSTICE BURKE delivered the opinion of the court:

The Administratrix of the Estate of George Dewey Jensik, Deceased, appeals under the summary judgment procedure from an order allowing the claim of Ellen M. Enoch and David W. Enoch in the amount of $17,750. No evidence was heard. The facts appear in the verified claim and claimants' answers to interrogatories, none of which allegations or answers are controverted by any pleadings or other documents. All of the allegations of fact in the verified claim are admitted by the administratrix by her failure to deny them in her answer or amendment thereto.

George Dewey Jensik, the decedent, was one of the incorporators, a director and secretary-treasurer of Alcore Homes Incorporated, a Kansas corporation. All three incorporators, Glen C. Martin, Guy J. Maresca and George Dewey Jensik, were residents of Illinois. The Articles of Incorporation were filed in the office of the Secretary of State of Kansas on November 4, 1957. The resident agent of the corporation in Kansas was Prentice-Hall Corporation System and the registered office was in the Columbian Building, Shawnee County, Kansas. Early in 1958 a lease was executed on behalf of the corporation as lessee by Glen C. Martin, president, and the decedent, George Dewey Jensik, secretary, and Ellen M. Enoch and David W. Enoch as lessors, to certain real estate in Wichita, Sedgwick County, Kansas. In the transaction involving the execution of the lease the corporation was represented by counsel. The lease bears the date of January 27, 1958. It was executed by the various parties thereto sometime during the period from February 1 to February 20, 1958. The

lessee agreed to pay $57,000 as rental for the premises for the period from February 1, 1958 through January 1, 1963, at the rate of $950 per month in advance. The first payment became due February 1, 1958. The first month's rent was paid. No further payments were made. Claimants made extensive efforts to lease the premises to others in order to mitigate their damages, but were unable to do so, except as to one small room in the east end of the building which was rented from April 1, 1959 to March 1, 1960 at the rate of $50 per month. An affidavit stating that the amount of capital had been fully paid in was not filed with the Register of Deeds of Shawnee County, Kansas.

The administratrix maintains that the allowance of the claim under the summary judgment procedure cannot stand because it is based on Secs. 35, 40 and 57 of the Civil Practice Act, which are not applicable to the filing of, objection to and proof of claim in the Probate Court. Section 5 of the Probate Act provides that the provisions of the Civil Practice Act and the rules adopted pursuant thereto apply to all proceedings under the Probate Act, unless otherwise provided by the latter Act. *In re Estate of Brauns*, 330 Ill. App. 322; 324, 325; *In re Estate of Schafer*, 344 Ill. App. 608, 618. Summary judgment procedure is an important tool in the administration of justice. Its use in a proper case, wherein is presented no genuine issue as to any material fact, is to be encouraged. *Allen* v. *Meyer*, 14 Ill. 2d 284, 292. The use of summary judgment procedure in the Probate Court where there is no genuine issue as to any material fact should be encouraged.

The administratrix asserts that the claim is to recover a statutory penalty created by the State of Kansas that did not survive the death of the decedent, is unenforceable and is a type of claim of which the Probate Court has no jurisdiction, citing *Diversey* v. *Smith*, 103 Ill. 378; *Gridley* v. *Barnes*, 103 Ill. 211; *Vestal Co.* v. *Robertson*, 277 Ill. 425;

Crouch v. *Gray*, 290 S.W. 391; and other cases. The statute relied upon is set out in the claim. The essential parts read:

> "17-2806 . . . A. A corporation formed under this act shall not incur any debts or begin the transaction of any business, except such as is incidental to its organization . . . until: . . . (2) The amount of capital with which it will begin business, as stated in the articles of incorporation shall have been fully paid in; and (3) there shall have been filed in the office of the register of deeds of the county where the registered office of said corporation is located, an affidavit signed by the treasurer of the corporation stating that the amount of capital which the articles of incorporation state will be paid in before the corporation will commence business, has been fully paid in. B. If a corporation has transacted any business in violation of this section, the officers who participated therein and the directors, except those who dissented therefrom . . ., shall be severally liable for the debts or liabilities of the corporation arising therefrom."

We are convinced that the decision of this case must be governed by Kansas law. The lease involves Kansas real estate. The corporation and organization was not completed as a Kansas corporation. Decedent went into that state to do business and sought to immunize himself against personal liability for obligations contracted in connection with that business by forming a Kansas corporation. Whether he succeeded in escaping personal liability must be determined by Kansas law. The decedent and his associates, Glen C. Martin and Guy J. Maresca, all residents of Illinois, went into Kansas for the purpose of conducting business operations. They took the initial steps necessary to form a corporation. Among other things, they entered into a lease for Kansas real estate owned by appellees. They are personally liable for the obligation undertaken by them in the lease unless they can establish that they

have immunized themselves against personal liability by forming a corporation in compliance with Kansas law. They did not comply with the requirement of Sec. 17-2806 of the Kansas statute establishing the conditions precedent for the transaction of business as a corporation. Decedent's affidavit as treasurer was never filed with the Register of Deeds of Shawnee County. A reasonable inference from the failure to file the affidavit is that the required capital was never paid into the corporation, and that therefore no such affidavit could be made or filed.

Before the statutory enactment in Kansas the liabilities declared therein were imposed at common law on incorporators, directors and officers who incurred obligations in the name of the corporation before the condition precedent to its doing business had been met. Under the Kansas decisions decedent's liability rests on a contractual basis. *Hall Lithographing Co.* v. *Crist*, 160 P. 198; (Kan. 1916); *Weber Engine Co.* v. *Alter*, 245 P. 143; (Kan. 1926); *Walton* v. *Oliver*, 30 P. 172; (Kan. 1892); *Central Nat. Bank* v. *Sheldon*, 121 P. 340; (Kan. 1912); *Wechselberg* v. *Flour City Nat. Bank*, 64 Fed. 90; C.C.A. 7, 1894); Thompson on Corporations, 3rd, (1927) Vol. 6, Sec. 4742, pp. 638-639.

Our Supreme Court has decided that in cases such as this it will comply with the law of the state of incorporation in determining the nature of the liability and will enforce the liability in Illinois. In *Bigelow* v. *Gregory*, 73 Ill. 197, the defendants were incorporators of a Wisconsin corporation. Plaintiff brought an action *in assumpsit* in Illinois against the incorporators to recover for goods sold and delivered. The Wisconsin statute made both the publication of the articles and the filing of the certificate conditions precedent for doing business as a corporation. The Wisconsin statute was very similar to the statute later adopted in Kansas and cited in the instant case. In the *Bigelow* case the incorporators sought to avoid personal liability for debts contracted in the name of the corpora-

tion. Our Supreme Court rejected this defense, saying (202): "We are of the opinion that the defendants were liable as partners, and had not absolved themselves from responsibility as such by having become a corporation." Decedent and his associates went into Kansas to conduct a business enterprise. In attempting to form a corporation they did not comply with the requirements of the Kansas statute which would have enabled them to obtain individual immunity. Under Kansas law decedent and his associates remain personally liable for the obligations contracted in the name of the corporation. Under Kansas law this is a contractual liability imposed on all who participated in the common enterprise. Illinois will enforce that contractual liability in accordance with the law of Kansas. If decedent obtained any immunity from personal liability for debts contracted in this enterprise, it was only under the Kansas corporation law. If residents of Illinois may avoid contractual obligations incurred in Kansas simply by returning to Illinois and persuading a court in Illinois to repudiate Kansas law and substitute its own construction of its own corporate statutes, modern-day commercial dealings would become impossible and no creditor could safely contract outside the jurisdiction in which his debtors reside. Decedent became personally liable under the Kansas law and that liability will be enforced in Illinois.

We are of the opinion that the claim is one to enforce contractual liability of the decedent and within the jurisdiction of the Probate Court. The Kansas statutes are not penal, but declare and modify the common law contractual liability of participants in a common enterprise. Far from imposing a penalty in derogation of the common law, Sec. 17-2806B offered an officer and director an opportunity to escape from the common law contractual liability hitherto imposed on all officers of a corporation by permitting an officer to prove non-participation and a director to record

his dissent from an obligation incurred before the organization of the corporation had been completed and thereby avoid personal liability. At common law the courts of Kansas hold all who participated in the common enterprise liable for the obligations incurred in the name of the corporation before organization had been completed. *Hall Lithographing Co.* v. *Crist, supra.* Under Sec. 17-2806B the Kansas legislature modified the common-law rule by restricting the liability of officers to those who participated in the transaction of the business and by permitting a director to record his dissent to the transaction of business before complete organization and thereby escape liability. It is a remedial and not a penal statute. Kansas decisions adhere to the majority rule that such statutes are not penal but merely state a contractual obligation. In *Diversey* v. *Smith,* 103 Ill. 378, strongly relied upon by the administratrix, the action was against stockholders to enforce a liability imposed by the statute against them to the extent of the stock subscribed by them for obligations incurred in violation of the statute. The court determined that under the statute the debts and responsibilities were the primary obligation of the company and the stockholders were held liable not because of their debt, but solely on account of the debt of the company. The court also found the statute to be in derogation of the common law. The Kansas statutes are declaratory of the primary common law liability recognized and enforced in Kansas before their adoption. The Kansas statutes do not attempt to impose a liability of the corporation on its stockholders. They recognize and enforce the primary liability of joint venturers or partners for their obligations where such persons have failed to establish their immunity from liability by perfecting incorporation. In the *Diversey* case there was no question of the law of another state, nor any suggestion that the Illinois courts would ignore the law of another state and construe the statutes of another state as penal

in violation of a long-established, contrary construction by the state involved. This matter is controlled by Kansas law and we must look to the Kansas cases to determine the proper construction of the Kansas statutes. Under the Kansas cases the claim involved is upon a common law contractual liability which exists in Kansas independently of the statutes and survives as an action *ex contractu*.

Appellant says that the action is so unenforceable and unjust that it should be dismissed for want of equity without further expense to the estate. This is not a claim to enforce an equitable remedy, but to enforce a common law contractual liability. Claimants dealt in good faith with the decedents and his associates. The latter voluntarily went into Kansas to conduct a business enterprise for profit. They negotiated a lease for claimants' Kansas real estate. They were represented by competent counsel. The burden was on the administratrix to establish decedent's immunity from personal liability. *Bigelow* v. *Gregory*, *supra*. The administratrix has no just complaint because Mr. and Mrs. Enoch press their claim against the estate. The law is clear that the obligations under the lease are the joint and several liabilities of the partners.

The administratrix asserts that the lease was either still born or terminated before or on March 1, 1958, by its own terms by reason of the insolvency of the corporation and the provisions of Section IX of the lease, discharging the corporation from any further liability under the lease, and discharging the deceased from any possible statutory liability predicated upon it. Here the appellant raises an affirmative defense not pleaded or raised in the trial court. The argument that the lease terminated because of the insolvency of the corporation is based upon deductions from a document not in evidence, which the administratrix refused to admit was genuine. The argument also ignores Kansas law which made the lease as much decedent's primary obligation as if he had executed it in his own name.

The administratrix insists that the summary judgment proceedings violates Sec. 2 of the Evidence Act and Supreme Court Rule 15 in that it is based on statements of purported facts made by plaintiffs in their own affidavits to which neither, if sworn as a witness, could competently testify. Claimants filed no affidavits in support of their motion for summary judgment. Therefore Supreme Court Rule 15 has no application. Section 196 of the Probate Act requires that a verified claim be filed by every claimant. Section 2 of the Evidence Act purports to apply to testimony and not to pleadings. The administratrix admitted all material facts pleaded in the claim by her failure to deny them in her answer. No testimony was necessary to support the allegations of fact in the claim. There is no merit in appellant's contention. The administratrix states that the order allowing the claim cannot stand because she has stated in her pleadings that she has no knowledge of certain allegations in the statement of claim, and that she has no knowledge thereof sufficient to form a belief, and has attached an affidavit of truth of the statement of want of knowledge. The facts set forth in the verified claim were admitted. Claimants then filed a motion for an order under the summary judgment procedure of Sec. 57 of the Civil Practice Act. The administratrix had the right to file counter-affidavits. No affidavits were filed by claimants. The administratrix filed a document purporting to be an affidavit which was stricken for failure to conform to Rule 15 of the Supreme Court. The administratrix also filed a motion in opposition to the motion for summary judgment in which she stated that she had denied knowledge of or information sufficient to form a belief of the correctness of any allegation in the claim. She had not in her answer denied knowledge of or information sufficient to form a belief. The trial judge was right in ignoring the assertion and in determining that the pleadings showed that there was no general issue as to any material fact.

The administratrix argues that the Probate Court had no jurisdiction of the claim because liability under the lease is contingent and for an unliquidated amount, citing *Beebe* v. *Kirkpatrick*, 321 Ill. 612 and *Foreman State Trust & Savings Bank* v. *Tauber*, 348 Ill. App. 280. In *Chicago Title & Trust Co.* v. *Fine Arts Building*, 288 Ill. 142-156, the court upheld the allowance of a claim for rent due through the period of administration, while holding that a claim for the balance of the term beyond the period of administration was contingent. In *Mackin* v. *Haven*, 187 Ill. 480, 494, the lessor was allowed to recover in the Probate Court for rent accruing during the period of administration but not for the balance of the term after the period. The cases cited by the administratrix do not support her contention. In the *Tauber* case the court pointed out that the claim must remain contingent during the whole period of administration to be denied allowance against decedent's estate. In the *Beebe* case the payee of a promissory note guaranteed by decedent brought suit against decedent's heirs to enforce payment. The notes were not due at the date of decedent's death. The holding in this case does not support the administratrix's position. The contingencies mentioned by the Supreme Court in the *Chicago Title & Trust Co.* case did not occur during the period of administration. In the case at bar the claim for rental through September, 1959, became absolute during the period of administration. None of the contingencies which might have terminated liability under the lease occurred during the period of administration. The liability for rental was absolute when it was presented to the Probate Court. We think that the Probate Court had jurisdiction to allow the claim for $17,750. The administratrix says that the order entered under summary judgment procedure cannot stand because there are many issues of fact to be decided, especially, whether claimants have made a reasonable and diligent effort to mitigate their damages as re-

quired by Kansas law. The administratrix admitted all the material facts by her failure to deny them in her answer and amendment thereto. She asserts that perhaps the building had been destroyed, or that there had been an undisclosed written termination of the lease, or that there had been insolvency or bankruptcy proceedings. These were all affirmative defenses which she was free to plead if she desired to do so and could find evidence to support them. She asks us to disregard the uncontradicted evidence and assume that the listing of the property with various reputable realtors in Wichita was not a sufficient effort by claimants to mitigate their damages. She had from August 11, 1959 to January 17, 1961, to investigate this matter. From October 5, 1960 to January 17, 1961, she had available to her the names and addresses of the brokers with whom the property had been listed and the other details of claimants' efforts to re-lease the property. She made no effort to contradict claimants' statements relating to their efforts to re-lease except to suggest in a document entitled an affidavit and stricken by the court that she had hired a lawyer in Emporia to investigate the real estate market in Wichita, but that he had gone away somewhere and had not reported to her. She offered no contradictions of the facts and the court properly concluded that the facts established a reasonable effort to mitigate the damages as required by the Kansas cases.

The administratrix argues that the claim should not have been allowed because no judgment has been obtained against the corporation and execution issued and returned *nulla bona* as required by Sec. 17.4009 of the Kansas statutes. Where the organization of the corporation is not completed, as in this case, the liability for obligations under the Kansas law is a personal liability of the incorporators, officers and directors. Neither Sec. 17.2806B (declaring in a modified form the common law contractual liability of officers and directors) or Sec. 17.2807 (declaring the com-

mon law liability of incorporators) requires the claimants to go through what would be the obviously futile act of first suing the corporation, obtaining a judgment and having an execution issued and returned *nulla bona*. Section 17.4009 refers only to directors and stockholders. It has nothing whatsoever to do with actions against officers and incorporators. The two cases relied upon by the administratrix, *Valley Bank* v. *Ludres Society*, 28 Kan. 123; and *Corey Lumber Co.* v. *Neal*, 3 Kan. App. 39, 42 P. 925, make it clear that Sec. 17.4009 pertains only to situations where the corporate organization has been completed and the liability of a director because of an illegal dividend or the super-added liability of a stockholder is being enforced. Section 17.4009 of the Kansas statutes has no application to the situation here.

Finally the administratrix says that the claim should not have been sustained because the deceased did not participate in the execution of the lease. In her answer the administratrix did not deny the participation of the decedent in the execution of the lease. He signed the lease. Section 17.2806B holds an officer liable who participated in the transaction of business. There is nothing to indicate that decedent was unaware of the contents of the lease or disapproved the transaction. Decedent was also liable as a director and an incorporator irrespective of his status as secretary-treasurer and whether his signing of the lease constituted participation in the lease transaction.

For the reasons stated the order allowing the claim is affirmed.

Order affirmed.

FRIEND, P.J., and BRYANT, J., concur.

APPENDIX "B"

Constitution of Kansas § 2 p. LXXI

"Dues from corporation shall be secured by the individual liability of the stockholders to the amount of stock owned by each stockholder, and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations not corporations for religious or charitable purposes."

"The General Corporation Code" Kansas Statutes Annotated

17-2703 p. 563

"Until the directors are elected, the signers of the articles of incorporation shall have the control and management of the affairs, and the direction of the organization of the corporation, and may take such steps as are proper to obtain the necessary subscriptions to stock and to perfect the organization of the corporation, including the election of directors."

17-2801 pp. 563-4

17-2802 "The articles of incorporation shall set forth: . . . "G. The minimum amount of capital with which the corporation will commence business, which shall not be less than one thousand dollars."

17-2803.

17-2804 p. 564 "The articles shall be signed and duly acknowledged by each of the incorporators. Said articles shall be filed in the office of the secretary of state, who shall furnish a certified copy of the same under his hand and seal of office, and said certified copy shall be recorded in the office of the register of deeds of the county where the registered office of said corporation is to be located in this state."

17-2805 pp. 564-5 "Upon duly executing the articles of incorporation and causing the same to be filed, and a certified copy thereof recorded as aforesaid, and paying the fees hereinafter provided for to the secretary of state, the persons so associating, their successors and assigns, shall from the date of such filing be and constitute a body corporate, by the name set forth in said articles, subject to dissolution as in this act elsewhere provided. A fee of twenty-five dollars to be known as an application fee shall be paid to the secretary of state upon the filing of the articles of incorporation by a domestic corporation, or an application by a foreign corporation to engaged in business in this state, and there shall also be paid to the secretary of state a fee of two dollars and fifty cents for the filing and recording of the articles of incorporation or certificate of authority to do business in this state, and any amendment. Each such corporation shall also pay such capitalization fees as are now required by section 17-221 of the General Statutes of 1955, and any amendments thereto: *Provided, however*, That domestic corporations organized for religious, educational, or charitable purposes having no capital stock shall not be required to pay application fee.".

17-2806 p. 565 "A. A corporation formed under this act shall not incure any debts or begin the transaction of any business, except such as is incidental to its organization or to obtaining subscriptions to or the payment for its shares, until: (1) The corporate existence shall have begun as provided in Section 14 [17-2805]. (2) The amount of capital with which it will begin business, as stated in the articles of incorporation, shall have been fully paid in; and (3) there shall have been filed in the office of the register of deeds of the county where the registered office of said corporation is located, an affidavit signed by the treasurer of the corporation stating that the amount of capital which the articles of incorporation state will be

paid in before the corporation will commence business, has been fully paid in. B. If a corporation has transacted any business in violation of this section the officers who participated therein and the directors, except those who dissented therefrom and caused their dissent to be filed at the time in the registered office of the corporation or who being absent, so filed their dissent upon the learning of the action, shall be severally liable for the debts or liabilities of the corporation arising therefrom."

17-2807 p. 565 "When the existence of a corporation has begun under the provision of section 14 [17-2805] and the conditions preceding to the beginning of business under the provisions of section 15 [17-2806] have been performed, the promoters, subscribers and incorporators shall thereafter be relieved and released from all personal liability for the obligations of such corporation contracted in its name, either before or after the organization thereof, unless said corporation within thirty days from the date of filing the affidavit provided for in section 15 [17-2806] shall have disaffirmed or repudiated said obligation made on its behalf."

17.3091 pp. 565-6 "Every private corporation created under the provisions of this act shall have the power and capacity possessed by natural persons to perform all acts within or without this state. Subject to any limitations or restrictions which may be imposed thereon by the articles of incorporation, every private corporation shall have power and authority: . . . D. To hold, purchase, acquire, sell, convey, lease, mortgage, and dispose of property, real or personal, tangible, including its rights, privileges, and franchises . . . J. The articles of incorporation shall constitute an agreement by the directors and officers with the corporation that they will confine the acts of the corporation which are authorized by the statement of purposes

and within such limitations and restrictions as may be imposed by the articles, or under the provisions of this act."

17-3101 pp. 567-568 "The business of every corporation shall be managed by a board of directors except as hereinafter or in its articles of incorporation or bylaws otherwise provided. The number of directors which constitute the whole board shall be such as from time to time shall be determined by the articles of incorporation. In no case shall the number be less than three. Directors need not be stockholders unless so required by the articles of incorporation. When a director shall have filed his resignation in writing with the secretary of the corporation he shall cease to be liable for any acts of the corporation which are done subsequent to the filing of his resignation. A director shall be deemed qualified as such when he shall have filed written acceptance of his election and not before . . ."

17-3105 p. 568 "Every corporation shall have a president, secretary and treasurer. They shall hold their offices until their successors are chosen and qualified unless the respective terms of office has been terminated by a resignation in writing duly filed in the office of the secretary of the corporation. The president shall be chosen from among the directors. The secretary shall record all the proceedings of the meetings of the corporation and directors in a book to be kept for that purpose, and perform such other duties that shall be assigned to him. The secretary and treasurer may or may not be the same person, and if the corporation have a vice-president, he may, if deemed advisable by the board of directors, hold the office of vice-president and treasurer, or vice-president and secretary, but not the offices of vice-president, secretary and treasurer. The corporation may be such other officers, agents and factors as may be deemed necessary . . ."

17-4007 p. 581 "When the officers, directors or stockholders of any corporation shall be liable by the provisions of this act to pay the debts of the corporation, or any part thereof, any person to whom they are liable may maintain an action against any one or more of them."

47-4008 p. 581 "When an officer, director or stockholder shall pay any debt of a corporation for which he is made liable by the provisions of this act, he may recover the amount so paid in an action against the corporation for money paid for its use."

47-4009 p. 581 "No suit shall be brought against any director or stockholder for any debt of a corporation of which he is such director or stockholder, until judgment be obtained therefor against such corporation and execution thereon returned unsatisfied, in whole or in part."

17-4505 p. 587 "This act shall be known and may be cited as 'the general corporation code'."

"Causes of Action Which Survive"
Kansas Statutes Annotated

60-3201 p. 1744 "In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the persons or, to real or personal estate, or for any deceit or fraud or for death by wrongful act or omission, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same."

APPENDIX C.

ILLINOIS CIVIL PRACTICE ACT

Section 1. Scope of Act.) The provisions of this Act apply to all civil proceedings, both at law and in equity, in courts of record, except in attachment, ejectment, eminent domain, forcible entry and detainer, garnishment, habeas corpus, mandamus, ne exeat, quo warranto, replevin, foreclosure of mortgages or other proceedings in which the procedure is regulated by separate statutes. In all those proceedings the separate statutes control to the extent to which they regulate procedure, but this Act applies as to matters of procedure not so regulated by separate statutes. As to all matters not regulated by statute or rule of court, the practice at common law and in equity prevails.

§ 43. Separate counts and defenses. * * * An answer containing only defenses to jurisdiction of the subject matter or in abatement does not constitute an admission of the facts alleged in the complaint, counterclaim or third-party complaint.

§ 57. Summary judgments and decrees.) (1) For plaintiff. Any time after the opposite party has appeared or after the time within which he is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment or decree in his favor for all or any part of the relief sought.

(2) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment or decree in his favor as to all or any part of the relief sought against him.

(3) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment or decree sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law. A summary judgment or decree, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(4) Form of affidavits. The form and contents of and procedure relating to affidavits under this section shall be as provided by rule.

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ILLINOIS SUPREME COURT RULES

Rule 15

AFFIDAVITS IN PROCEEDINGS FOR SUMMARY JUDGMENT OR DECREE AND UNDER SECTION 48

(1) Affidavits in support of and in opposition to a motion for summary judgment or decree, and affidavits under section 48 of the Civil Practice Act, shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.

ILLINOIS PROBATE ACT

§ 3a. PLEADINGS.] On the court's own motion or on motion made by interested person, before or during any hearing, any person who desires to oppose the entry of an order, judgment or decree by the court shall file, as directed by the court, a pleading disclosing the grounds of opposition. (Added by Act approved July 22, 1959.)

§ 4. POWER OF COURTS TO MAKE RULES.] (1) The supreme court of this state has power to make rules of pleading, practice, and procedure for the probate courts supplementary to but not inconsistent with the provisions of this Act, and to amend those rules for the purpose of making this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure in carrying out the provisions of this Act. (2) Subject to rules promulgated by the supreme court pursuant to this Act, the probate courts may make such rules regulating dockets, calendars, and the conduct of their business as they may deem expedient to carry out the provisions of this Act.

§ 192. FILING OF CLAIMS—FORM.] A claim against the estate of a decedent, a minor, or an incompetent may be filed in the probate court having jurisdiction of the estate. Every claim filed shall state the nature of the claim and shall be accompanied by an affidavit of the claimant or any person having knowledge of the facts that the claim is just and unpaid after allowing all just credits, deductions and set-offs. (Amended by Act filed July 21, 1941.)

§ 199. PROCEDURE ON HEARING OF CLAIMS.] On the call of a claim it may be allowed, set for trial, continued, or dismissed. A claim which is consented to by the executor, administrator, guardian, or conservator or to which no pleading has been filed within the time provided by this Act may be taken as proved or the court may require the claimant to prove his claim.